

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM OM 89-27

February 14, 1989

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Rosemary M. Collyer, General Counsel

SUBJECT: The Standard for Defining "Substantial
Justification" under the Equal Access to
Justice Act

On June 27, 1988 the Supreme Court decided its first case interpreting the Equal Access to Justice Act. Pierce v. Underwood, No. 86-1512, ___ U.S. ___, 108 S. Ct. 2541. During the course of that opinion, the Supreme Court interpreted the statute's phrase "substantially justified" as used in 28 U.S.C. 2412 (d)(1)(A). The statute provides, in relevant part, that:

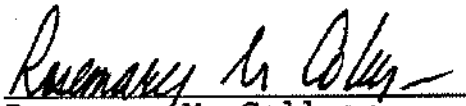
. . . a court shall award to a prevailing party other than the United States, fees and other expenses . . . unless the court finds that the position of the United States was substantially justified . . . (emphasis added). ^{1/}

The Court held that the appropriate meaning of the term is "'justified in substance or in the main'--that is, justified to a degree that could satisfy a reasonable person. That is no different from the 'reasonable basis both in law and fact' formulation adopted by . . . the vast majority of Courts of

^{1/} Section 2412 deals with the award of fees by courts. Section 504 deals with the award of fees by administrative agencies. The framers of the EAJA made no distinction between the phrase "substantial justification" as used in the former section and the same phrase used in the latter. H.R. Rep. No. 96-1418, reprinted in, 1980 U.S. Cong. & Admin. News, 4984; House Conference Report No. 96-1434, reprinted in, 1980 U.S. Cong. & Admin. News, 5003; Senate Debate, S. 9991, July 24, 1985; House Debate, F.R. 16914, June 24, 1985.

Penco, Inc., 278 NLRB No. 158, n. 1 (1986). Although the Board adopted this stricter standard, it has nonetheless stated that the amendments to the EAJA "did not change, but merely clarified, the definition of 'substantially justified.'" Supra. Also, Abbot House, Inc., 277 NLRB No. 24, n. 1 (1985). 4/

In light of the Supreme Court's decision in Pierce, the Regions should argue to the ALJ and the Board in all future cases that the appropriate standard for "substantial justification" under Section 504 is "reasonable both in law and fact." Additionally, in any pending cases, the Regions should file a position statement with the Board or the ALJ, as appropriate, setting forth the position taken herein.


Rosemary M. Collyer
General Counsel

cc: NLRBU

4/ Following the 1985 reenactment of the EAJA, the Board, on May 15, 1986, amended Section 102.144(a) to read: "The General Counsel, . . . may avoid an award by showing that the General Counsel's position in proceeding was substantially justified." 51 F.R. 17732 (May 15, 1986). In explanation of this change the Board stated: " To avoid any confusion or misunderstanding, the statutory language has been used in place of the phrase [reasonable in law and fact] presently in the rule." Supra.